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No. 07-788

IN THE
Supreme Court of the United States

BERNARD N. SHAW and B. JEAN SHAW, COLUMBIA BASIN APARTMENT ASSOCIATION, ROBERT LEE GAINES and BILLIE JEAN GAINES, MANUEL VALA, and MARIA GALEANA,
Petitioners,

v.

CITY OF PASCO,
Respondent,

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF AMICUS CURIAE OF RENTAL HOUSING ASSOCIATION OF PUGET SOUND AND THE WASHINGTON MULTI FAMILY HOUSING ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE OUT OF TIME 1

IDENTITY AND INTEREST OF AMICI 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I THE DECISION OF THE WASHINGTON SUPREME COURT UPHOLDING SO-CALLED "PRIVATE" SEARCHES CONFLICTS WITH NINTH CIRCUIT PRECEDENT IMPUTING PRIVATE ACTION TO THE GOVERNMENT WHEN PERFORMED AT THE GOVERNMENT'S BIDDING 7

II THIS APPEAL PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT HAS NOT, BUT SHOULD, DECIDE 12

CONCLUSION 13

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. Const., Fourth Amendment 13

STATE CASES

City of Pasco v. Shaw,
161 Wn.2d 450 (2007) ..... *Passim*

FEDERAL CASES

Bass v. Parkwood Hosp.,
180 F.2d 234 (5th Cir. 1999) 9

Blum v. Yaretsky,
457 U.S. 991 (1982) 9

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n,
531 U.S. 288 (2001) 8

Camara v. Municipal Court of San Francisco,
387 U.S. 523 (1967) 6

Jackson v. Metropolitan Edison Co.,
419 U.S. 345 (1974) 8

Peterson v. City of Greenville,
373 U.S. 244 (1963) 10

Skinner v. Railway Labor Executives' Ass'n,
489 U.S. 602 (1989).....10

Sutton v. Providence St. Joseph Med. Ctr.,
192 F.3d 826 (9th Cir. 1999).....9

United States v. Davis,
482 F.2d 893 (9th Cir. 1973).....10, 11

United States v. Ross,
32 F.3d 1411 (9th Cir. 1994).....11

MOTION FOR LEAVE TO FILE OUT OF TIME

The Amici identified below previously filed a brief that followed the formatting as set forth in the Court's prior rules. This brief is identical in substance to the previously filed brief. However, the Amici have re-printed the brief with changes to type size and font so as to conform to the Court's new rules. The Amici respectfully request that leave be granted to file the re-printed brief.

IDENTITY AND INTEREST OF AMICI

This brief is filed on behalf of the Rental Housing Association of Puget Sound and the Washington Multi Family Housing Association. The parties to the litigation have provided written consent to the filing of this brief, which consent has been lodged with the Clerk of the Court. [1]

The Rental Housing Association of Puget Sound ("RHA") is the largest association of rental housing owners in the Pacific Northwest, representing more than 4,400 members. RHA has appeared as an intervenor and *amicus* in numerous state administrative and appellate court proceedings involving the regulation of rental dwellings. The RHA participated as an amicus in the proceedings before the Washington Supreme Court.

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[1] Counsel for amici prepared this brief in whole, and no person or entity other than the amici provided any funding for the preparation or filing of this brief.

The Washington Multi Family Housing Association is the Washington chapter of the National Apartment Association and represents over 50 management companies encompassing over 62,000 apartment homes.

The interest of the amici in this case stems from the organizations' long-standing interest in licensing and inspection regulations for residential rental units. The amici are concerned that the City of Pasco's ordinance requiring searches of residential dwellings without a warrant or tenants' consent places landlords in an untenable position: their business licenses are conditioned upon tenants waiving their personal constitutional right to privacy.

STATEMENT OF THE CASE

The amici contend that the Washington Supreme Court decision allows government to circumvent the requirements of the Constitution by forcing private citizens to conduct searches where a search warrant would otherwise be required. In other words, the City of Pasco seeks to do indirectly what it cannot constitutionally do directly.

The key issue is what constitutes "state action" for purposes of the Fourth Amendment.

The issue stems from a City of Pasco ordinance that requires landlords to obtain and maintain a business license as a prerequisite to engaging in the residential rental business. Pet. for Writ of Cert., Appendix (App.) at 126 (Pasco Municipal Code ("PMC") § 5.78.010).

Before the City will issue the license, the landlord must provide a "certificate of inspection." *Id.* (PMC § 5.78.020(a)). The license must be renewed every two years, and the certificate of inspection (based on a new inspection) must also be resubmitted at each renewal. *Id.* at 127-28 (PMC § 5.78.020(b)).

The inspection is required even though there is no probable cause of any code violation. Likewise, inspections are required over the objection of the existing tenant. Rather than requiring an inspection when a tenant moves out—that is, during the period of vacancy between tenants—the Pasco ordinance requires existing tenants to succumb to inspection.

The inspection is carried out by the city's Code Enforcement Officer or by a qualified private inspector selected by the of the landlord, but approved by the City.

In its decision, the Washington Supreme Court stressed that the ordinance "does not authorize the city **itself** to search for housing violations." *City of Pasco v. Shaw*, 161 Wn.2d 450, 460, 166 P.3d 1157 (2007), reproduced at Pet. for

Cert., App.11 (emphasis added). Instead, the Court viewed the inspections as furthering a private purpose of obtaining a business license.

> [U]nder the Pasco ordinance a landlord can engage *private* inspectors in order to further the *private* objective of obtaining a certification needed to maintain a business license.

Id. (italics in original).

The Washington court's reasoning continued:

> The city insists only upon the certificate that an inspection has been successfully completed. Landlords first and foremost further their *own* ends when they engage in the inspections contemplated by the ordinance.

Id., 161 Wn.2d at 461, App. at 12 (italics in original).

While the landlords obviously want to secure a business license, it is Pasco that created the need for that license. It is also Pasco that conditioned license issuance on completion of an inspection. The dissent by Justice Sanders recognized both of these points, reasoning:

> Even though the ordinance allows landlords the option to utilize private inspectors approved by the city, private inspectors are simply doing the work of city inspectors. This is state action ...

161 Wn.2d at 467 (Sanders, J., dissenting); App. at 20. The dissent continued:

> The majority claims, however, private inspectors are merely furthering the "*private* objective of obtaining a certification needed to maintain a business license." Majority at 10. The business license requirement is imposed by the government. Moreover, landlords are coerced into complying with these unwanted intrusions into private residential units to further the government's objective of compliance with health and safety codes. The landlords are not "first and foremost furthering their *own* ends" .... but are actually furthering the city's ends.

161 Wn.2d at 469 (Sanders, J., dissenting); App. at 24.

The amici contend that the clear purpose of Pasco's ordinance is to increase compliance with city housing codes, not to benefit the landlord. *See* Pet. for Writ of Cert. App. 124 (preamble to Pasco Ordinance No. 3231). Here's the rub: unless the occupant consents, the City cannot inspect private dwellings without a warrant issued on probable cause of a code violation. Thus, under the ordinance, the city seeks to force the landlord to perform the searches for the city.

The issue presented here goes a step beyond *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967). There, this Court held that administrative searches "are significant intrusions upon the interests protected by the Fourth Amendment, that such searches, when authorized and conducted without a warrant procedure, lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Id.* at 534.

Clearly, then, if Pasco wished to inspect rental dwellings in compliance with the Fourth Amendment, it must first obtain tenant consent, or obtain a search warrant under this Court's holding in *Camara*. Trying to circumvent this requirement, the City, by way of the business licensing process, compels private landlords to perform inspections as a condition to doing business. The primary question of this appeal is whether a private inspection performed under this kind of governmental compulsion is properly attributed to the City for

purposes of the Fourteenth Amendment's state action requirement.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Washington upholds these inspections because they are ostensibly "private." That decision conflicts with precedent of the United States Court of Appeals for the Ninth Circuit. The result is to leave landlords in the impossible predicament of choosing to forfeit their right to conduct business by loss of a necessary license, or choosing to violate their tenants' privacy rights under the Fourth Amendment. This Court should grant certiorari to resolve this split and provide clear direction regarding the Fourth Amendment's applicability to landlord searches of tenants' homes at the direction of the state.

I

THE DECISION OF THE WASHINGTON SUPREME COURT UPHOLDING SO-CALLED "PRIVATE" SEARCHES CONFLICTS WITH NINTH CIRCUIT PRECEDENT IMPUTING PRIVATE ACTION TO THE GOVERNMENT WHEN PERFORMED AT THE GOVERNMENT'S BIDDING

The protections of the Fourth Amendment prevent abuses of the government only, not of private

citizens. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not.") (citation omitted).

Thus, to find a constitutional violation, the abuse in question must be attributable to "state action," the precise contours of which are not defined by formal distinctions. *Id.* This Court has stated the issue as follows:

> If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed.

Id. To hold the state responsible for private action, there must be a close nexus between the state and the action such that the action "'may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). The question of state action is highly fact specific:

"What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity."[2] *Id.*

One particular fact pattern this Court has recognized as constituting state action occurs when the state has

> exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (citations omitted).

> When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that

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[2] Lower courts have attempted to distill this Court's various cases on this topic into specific "tests" used to analyze state action. The Ninth Circuit, for example, uses four different tests: public function, joint action, governmental compulsion or coercion, and governmental nexus. *See, e.g., Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999). Even so, these courts recognize the fact intensive nature of the state action requirement: "Under any formula, however, the inquiry into whether private conduct is fairly attributable to the state must be determined based on the circumstances of each case." *Id.* at 836 (quoting *Bass v. Parkwood Hosp.*, 180 F.2d 234, 242 (5th Cir. 1999)).

> decision from the sphere of private choice.

Peterson v. City of Greenville, 373 U.S. 244, 248 (1963).[3]

Following these guidelines, the Ninth Circuit has recognized that "[t]he Fourth Amendment applies to a search whenever the government participates in any significant way in this total course of conduct." *United States v. Davis*, 482 F.2d 893, 897 (9th Cir. 1973).

In *Davis*, the defendant was convicted of attempting to board an airplane with a concealed weapon. *Id.* at 895. The weapon was found during a routine search performed by an airline employee, not a government official. *Id.* at 896. The court noted, however, that the search "was part of a nationwide anti-hijacking program conceived, directed, and

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[3] In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), for example, this Court examined regulations promulgated by the Federal Railroad Administration suggesting that private railroads test employees who violate safety standards for alcohol use. 489 U.S. at 606. Even though the regulations were not mandatory, this Court determined that these "private" tests were not "primarily the result of private initiative." *Id.* at 615. Rather, the government's "encouragement, endorsement, and participation" were sufficient "to implicate the Fourth Amendment." *Id.* at 615-16. In the same way, the inspections performed by landlords pursuant to the City's ordinance are not done primarily from private initiative, but rather at the "encouragement" (compulsion, rather) of the local government. In both instances, the Fourth Amendment is implicated.

implemented by federal officials in cooperation with air carriers," *id.* at 897, and concluded that the search was attributable to the government: "It makes no difference that the act of opening appellant's briefcase was accomplished by a 'private' airline employee rather than a 'public' official," *id.* at 904. Significantly, the court reasoned that

> [c]onstitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by 'private' persons or entities that is prohibited to the government itself.

Id. (emphasis added).[4] That result, amici submit, is precisely what happens under Pasco's inspection ordinance.

Justice Sanders in dissent correctly acknowledges:

> Pasco **instigates** and encourages these searches, **dictates** their scope, and **examines** their fruits. The housing code inspection not only **occurs at Pasco's demand**,

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[4] The Ninth Circuit reaffirmed this rule in *United States v. Ross*, 32 F.3d 1411, 1413-14 (9th Cir. 1994), in which it again applied the Fourth Amendment to a search of airline luggage by a private airline employee, finding the private action attributable to the government.

> but the ordinance also rigidly lays out who can perform the inspections ... Given such extensive government involvement, the physical search need not be done by an actual city employee to trigger constitutional protections.

Pasco v. Shaw, 161 Wn.2d at 468 (Sanders, J., dissenting) (emphasis added); App. at 22-23.

The Supreme Court of Washington disregarded the extensive government involvement in the City's inspection scheme, and reached precisely the opposite result dictated by Ninth Circuit precedent. This Court should grant a writ of certiorari to resolve this split of authority and provide clear direction for Washington's landlords with respect to inspections of their tenants' homes.

II

THIS APPEAL PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT HAS NOT, BUT SHOULD, DECIDE

The ramifications of the Supreme Court of Washington's analysis in this case are far reaching. Under the majority opinion, the government can condition the issuance of a necessary license on the performance of actions that the government cannot constitutionally perform itself. There is no reason to suppose that governments will not seize upon this

new power to create new conditions for other types of licenses. Numerous problems facing society can be addressed by the licensing process, and the government can hide with impunity behind so-called "private" actors who do the government's bidding while supposedly acting in their "own" best interest of securing the license. This Court should decide whether this practice withstands constitutional scrutiny.

Already, the Washington decision is having practical impacts. The City of Seattle has recently passed a resolution to review the Pasco ordinance with an eye towards adopting a similar measure. City of Seattle Resolution No. 31031, Dec. 17, 2007. The amici understand that numerous jurisdictions in Washington are waiting to see what happens in this Court. If allowed to stand, the "state action" requirement will effectively be circumvented and thousands of tenants will soon be subjected to unconstitutional invasions of their homes. This Court should grant review and determine whether the Pasco ordinance goes too far.

CONCLUSION

The Supreme Court of Washington's decision in this matter creates a conflict with Ninth Circuit precedent construing the "state action" predicate to the application of the Fourth Amendment. Absent tenant consent, searches performed at the behest of

the government, and for the government's benefit, presents a federal issue of substantial importance that this Court should decide.

For the foregoing reasons, *amici* respectfully request this Court to issue a writ of certiorari to the Supreme Court of Washington in this matter.

DATED: February 27, 2008.

Respectfully submitted,

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